IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1262

HERBERT M. GANNET,
Petitioner,

vs.

FIRST NATIONAL STATE BANK OF NEW JERSEY,
Respondent.

UNITED STATES OF AMERICA and
CARL E. REICHELT, Special Agent
of Internal Revenue Service,
Respondent,

vs.

FIRST NATIONAL STATE BANK
HERBERT M. GANNET, Intervenor in D.C.,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

HERBERT M. GANNET,

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vs.

FIRST NATIONAL STATE BANK OF NEW JERSEY,

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UNITED STATES OF AMERICA and
CARL E. REICHELT, Special Agent
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vs.

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HERBERT M. GANNET, Intervenor in D.C.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above case on December 27, 1976.

OPINIONS BELOW

The original orders and decision of the District Court for the State of New Jersey (No. 75-2028) are reported in 410 F. Supp. 585 (App. 27a). The opinion of the Court of Appeals for the Third Circuit in No. 76-1261 is officially reported in 540 F.2d 619 (App. 12a) which reversed and remanded the contempt and confinement orders of the District Court. The decision of the Court below in the instant case is not officially reported, but is unofficially reported at U.S. Court of Appeals, Third Circuit, Nos. 75-2362, 76-1234, filed December 27, 1976 (App. 1a).

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was made and entered on December 27, 1976 and copies thereof are appended to this Petition in the Appendix at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In a District Court enforcement order of February 23, 1976, Civil 76-124 (D.N.J.) First National State Bank of New Jersey was ordered to comply with an Internal Revenue Service summons requesting the name, address and social security number of the purchaser of two cashiers checks and all documentation relative to the source of the funds used to purchase those checks. The cashiers checks had been deposited into a New Jersey attorney's trust account from which a check was drawn to effect an anonymous transmission to the Internal Revenue Service in payment of a tax liability of an unidentified taxpayer. The District Court ordered that the bank must comply with

the summons and provide the requested information regarding the purchaser of said checks. The Court of Appeals affirmed said order. The questions presented are:

1. Where unusual circumstances are present, does the Attorney-Client privilege protect the identity of Petitioner's unidentified client.

2. Assuming that the Attorney-Client privilege exists, is the information obtained from a New Jersey attorney's trust account, which he is required to maintain by the rules of the highest court of the State in which he practices, included within the scope of the privilege.

3. Does the District Court have an obligation to inquire into the nature and extent of the existence of the Attorney-Client privilege asserted by the intervenor- attorney on behalf of his unidentified client.

4. Do the requirements of the Bank Secrecy Act of 1970 relating to disclosure of information to government agencies include a New Jersey attorney's trust account which he is required to maintain by the rules of the highest court of the State in which he is admitted to practice law.

5. If an Internal Revenue Service summons is not issued in good faith, is the proceeding brought by the Internal Revenue Service to enforce such summons improper because it is an abuse of the District Court's process.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of the Bank Secrecy Act of 1970, 12 U.S.C. Section 1829b, the New Jersey Supreme Court Rule 1:21-6, and Internal Revenue Code Sections 7602 and 7604 are set forth in the Appendix at page 43a through 50a.

STATEMENT

This Petition involves a summons issued under Internal Revenue Code Section 7602 and the inspection of bank records maintained under the Bank Secrecy Act of 1970, 12 U.S.C. Section 1829b. The taxpayer involved engaged the Petitioner as his attorney to provide legal services and advice with respect to a federal income tax problem. As a result of substantial legal services rendered to the said client, Petitioner made certain recommendations which included the arrangement for a voluntary mailing of a sum of money to the Internal Revenue Service. Such voluntary payment was effectuated through the use of the Petitioner's attorney's trust account.

In an effort to comply with the client's requirement that the client's identity remain confidential, Petitioner retained Herbert L. Zuckerman for the purposes of transmitting monies to the Internal Revenue Service.

The Internal Revenue Service traced the funds from Mr. Zuckerman to the Petitioner's attorney's trust account. On October 3, 1975, First National State Bank of New Jersey (hereinafter referred to as the "Bank") was served with an Internal Revenue Service summons under Section 7602 of the Internal Revenue Code requiring it to produce:

(A) "All negotiable instruments and deposit slips which relate to the source of the funds used for the issuance of check No. 1186 drawn on the account of Herbert M. Gannet Trust Account dated November 4, 1974 in the amount of $142,497.81. The check was made payable to Herbert L. Zuckerman."

(B) "Monthly bank statements, and all deposit tickets in the amount of $1,000.00 or above, covering the period of October 1, 1974 through November 4, 1974."

On October 31, 1975, the Petitioner was advised by the Bank that it complied in part with the aforesaid summons in that it provided copies of two cashier's checks deposited into petitioner's attorney's trust account drawn on itself, Nos. 39649 and 39651 in the amounts of $65,182.66 and $77,315.15 respectively, both dated October 31, 1974 and made payable to the Petitioner.

On November 3, 1975, the Petitioner served a written demand on the Bank to refuse to furnish any additional information regarding the trust account to the Internal Revenue Service, and to advise the Internal Revenue Service that the Bank refuses to produce such information.

On November 19, 1975, the Bank was served with another Internal Revenue summons, the summons which led to an action in the District Court under Internal Revenue Code Section 7604 requiring it to produce information which emanated from the Bank's compliance in part with the first summons previously referred to regarding the name, address and social security number of the purchaser of cashier's checks Nos. 39649 and 39651 and all documentation relative to the source of the funds used to purchase said checks.

At the hearing on the application for enforcement of the aforesaid summons, held on February 23, 1976, the United States District Court allowed the Petitioner to intervene as a party Defendant and consolidated therewith the action instituted by the Petitioner against the Bank in Civil Action No. 75-2028. For the reasons stated in the transcript of the hearing held on February 23, 1976, District Court ordered the Bank to comply with said summons on March 1, 1976. The Petitioner's timely application to that Court for a stay pending appeal of the enforcement order was denied. The denial was stayed until such time as a panel of the Circuit Court of Appeals for the Third Circuit could rule on the Petitioner's Motion for a stay

pending appeal. On March 8, 1976, the panel of the Court of Appeals declined to stay the enforcement order. Petitioner's application to the Honorable William J. Brennan of the United States Supreme Court for a stay of the enforcement order was denied on March 9, 1976.

Although the appeal was still pending in this case, on March 19, 1976, the Honorable Vincent P. Buinno of the United States District Court, without notice to Petitioner, turned over to the Government, the documents requested in the summons involved herein. Said documents had previously been turned over to the Court by the Bank under seal in Civil Action No. 75-2028. Petitioner's appeal in that case was docketed in the Court of Appeals for the Third Circuit as No. 75-2362 and because the legal issues and facts in that case are identical to the facts in the instant case, the Court of Appeals for the Third Circuit has consolidated the two cases for disposition. The said Court of Appeals held that the orders of the District Court should be enforced, such decision leading to this appeal under 28 U.S.C. 1254(1).

It is the Petitioner's contention that the enforcement order of the District Court is in error for the following reasons:

1. The Attorney-Client privilege protects the identity of Petitioner's client;

2. That the Attorney-Client privilege protects the disclosure of information sought in the summons;

3. The District Court is obligated to inquire into the nature of the services performed by the Petitioner for his unidentified client to determine whether the information contained in his trust account was integrally related to the legal advice given and services rendered to his client and

therefore, whether such information is within the Attorney-Client privilege.

4. The Bank Secrecy Act of 1970, upon which the Court of Appeals for the Third Circuit relied in allowing the Bank to disclose such information, was not intended to encompass Petitioner's attorney's trust account; and

5. The summons was not issued in good faith and therefore, the enforcement proceedings were improper because it was an abuse of the District Court's process.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it represents a conflict with other Courts of Appeals regarding the extent to which the Attorney-Client privilege encompasses the right of an attorney to keep confidential his client's identity. The decision of the Third Circuit in the instant case conflicts with that of the Ninth Circuit in *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960), the Seventh Circuit in *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965) and the 5th Cir. *In re Grand Jury Proceedings*, 517 F.2d 666 (5th Cir. 1975).

The District Court for the District of New Jersey did not inquire into the nature and extent of the services performed by the Petitioner on behalf of his client to ascertain whether the information contained in Petitioner's trust account was an integral part of the legal advice given and therefore, within the protection of the Attorney-Client privilege. Due to such failure, the decision of the District Court and that of the Court of Appeals for the Third Circuit should be reversed, in accordance with *United States v. Tratner*, 511 F.2d 248 (7th Cir. 1975).

It is also contended that the Third Circuit incorrectly interpreted Section 1829b of the Bank Secrecy Act of 1970 (App. 45a) to apply to an attorney's trust account required to be maintained under New Jersey Supreme Court Rule 1:21-6 (App. 48a).

Petitioner further contends that the Third Circuit's decision allows an abuse of the District Court's process by allowing the Internal Revenue Service to issue a summons under Section 7602 of the Internal Revenue Code (App. 43a) in a criminal investigation. Such a summons is contrary to this Court's decision in *Donaldson v. United States*, 400 U.S. 517 (1971).

For any one or more of the aforementioned reasons, this Court should grant review.

1. From the statement of the case, it is obvious that any disclosure of the source of the payment to the Internal Revenue Service which includes the identity of the client who initiated the payment of the funds on the advice of counsel would yield a probative link in an existing chain of inculpatory events which would violate Petitioner's unidentified client's Fifth Amendment rights. The payment amounts to an admission of prior underpayment of taxes. The identity of the client will supply the last link of events by which the Petitioner's unidentified client will be subject to the penal sanctions of the Internal Revenue Code. Therefore, such information is within the Attorney-Client privilege due to the unusual circumstances described herein.

If a client had related certain facts to his attorney and had asked said attorney for his opinion as to whether additional taxes were due and what procedures should be followed, the recommendation of the attorney would be within the Attorney-Client privilege. As a result of the normal workings of the attorney's office, several of his employees and agents may have access to and be involved in accumulating information to render the attorney's opinion. Under such circumstances, neither the attorney nor his employees or agents could be required to state the information given to said attorney in confidence by his client and his response thereto. (*Baird v. Koerner, supra*).

In *Fisher v. United States*, 96 S.Ct. 1569 (1976), the Court, in arriving at its decision, analyzed the Attorney-Client privilege and stated:

> "Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. 8 Wigmore, Evidence, Section 2291, supra; McCormick

> Evidence, Section 87 et seq. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. 8 Wigmore, Evidence, Section 2291 and 2306 at 590, supra; McCormick Evidence, Section 87 page 175, Section 91 page 192; *Baird v. Koerner*, 279 F.2d 623 (CA9, 1960); *Modern Woodmen of America v. Watkins*, 32 F.2d 352, (CA5, 1943); *Pritchard v. United States*, 181 F.2d 326 (CA6) aff'd 339 U.S. 974; *Schwimer v. United States*, 232 F.2d 280 (CA6, 1964.)"

Petitioner contends that this Court has implicitly approved the determination of *Baird v. Koerner, supra*, that the name of the client, under similar fact circumstances presented herein, falls within the Attorney-Client privilege.

To otherwise hold, would effectively destroy the privilege as it relates to the identity of an attorney's client, and potentially to other privileged communications. The natural consequences of such a conclusion is that any taxpayer who has underpaid his taxes in the past, will be precluded from correcting such error for fear that his identity will be disclosed and prosecution will follow. While the Federal Government has an obligation and right to protect its sources of revenue and its laws, such obligation is secondary to a taxpayer's right to fully and freely communicate with an attorney in seeking legal advice. Such a client should be free from the concern that his disclosures to an attorney and the implementation of the attorney's recommendation will not be confidential.

In *McFee v. United States*, 206 F.2d 872 (9th Cir. 1953), *vacated* 348 U.S. 905 (1955), *aff'd on rehearing* 221 F.2d 807 (9th Cir. 1955), *cert. den.* 350 U.S. 825 (1955), the Court held that attorneys who had purchased cashiers checks for a taxpayer could not invoke the Attorney-Client privilege since they were mere transmitters of funds and had not performed substantial legal services. Additionally, there was no evidence that the taxpayer had requested that the attorney keep his identification confidential. As such, *McFee v. United States, supra*, is inapposite to the instant case.

Furthermore, in *Gannet v. First National State Bank of New Jersey*, (Superior Court of New Jersey, Docket No. C-283-75, unreported decision) (App. 51a) an Order to Show Cause and a Temporary Restraining Order returnable on March 26, 1976 was entered against the First National State Bank of New Jersey to preclude it from giving the information requested in the Internal Revenue Service summons dated November 19, 1975. The order was entered because compliance with such summons would violate New Jersey Supreme Court *Rule* 1:21-6(f) as a breach of the Attorney-Client privilege which, according to the Superior Court of New Jersey, protects the information contained in the attorney's trust account from disclosure.

Prior to the return date of the aforesaid Order to Show Cause, the United States District Court without notice to Petitioner, turned over to the Government the documents requested in the summons involved herein. Said documents had previously been deposited with that Court under Seal in Civil Action No. 75-2028. On the return date of the Order to Show Cause, in Superior Court of New Jersey, Chancery Division (unreported decision, transcript T-396-75, p. 5); the Petitioner, during his oral presentation, stated (App. 55a):

> "I'd like this Court to make a definitive statement or judgment on what our rules of the court mean in terms of Rule 1:21-6 as to whether or not my attorney's trust account is part of the privileged communications as disclosed in the Rule."

The Court responded:

> "Mr. Gannet, I wouldn't have given you the original temporary restraining order if I did not think the rules of the Court meant what they say."

The New Jersey Superior Court interpreted the Supreme Court Rules of the State of New Jersey, which require an attorney to maintain a trust account, to mean that such account is within the Attorney-Client privilege, and an attorney may restrain a bank from turning over information relating to said account to anyone.

Notwithstanding the fact that the Bank Secrecy Act of 1970 (12 U.S.C. Section 1829b) expressly recognizes the usefulness of bank records in tax investigations, there is no indication or inference of an intention to curtail the existing Attorney-Client privilege. Petitioner submits that the disclosure of the records of his trust account, which is required to be maintained by the rules of the highest court of the State in which he practices, to the Internal Revenue Service so it can ascertain the identity of a client who deposited funds with the Petitioner as an integral part of the legal services rendered for such client is a violation of the Attorney-Client privilege under the unusual circumstances present in this case.

As previously noted in *Baird v. Koerner, supra, Tillotson v. Boughner, supra,* and *In re Grand Jury Proceedings, supra,* Attorney-Client privilege extends to the client's identity. To allow the Government to obtain the client's identity through a subpoena of the attorney's trust account records, which is a vital and required part of an Attorney-Client relationship, allows the Government to do indirectly what is specifically prohibited from doing directly; obtaining the identity of a client when such identity is within the Attorney-Client privilege.

In *Schulze v. Rayunec*, 350 F.2d 666 (7th Cir. 1965), *cert. den.* 382 U.S. 919, relied on by the Third Circuit, it was held that the Attorney-Client privilege did not encompass bank records which involved the purchase of cashiers checks on behalf of the unidentified client. The Court held that a mere debtor-creditor relationship was established upon the purchase of such cashiers checks.

The difference between *Schulze v. Rayunec, supra,* and the present case are significant. In the former, the attorney was a mere transmitter of funds and did not perform substantial legal services for the unidentified client. Furthermore, there was no evidence that the attorney was required by the rules of the highest court of the State where he practices law to maintain a trust account. In the instant case there are both substantial legal services performed as part of the legal advice given the unidentified client and the requirement of the rules of the highest court in the State where Petitioner practices law that a trust account be maintained. These facts justify the conclusion that the records were part of the total legal services performed and that therefore, there was more than a mere debtor-creditor relationship.

The relationship which existed was that of principal-agent. The attorney, as required by Supreme Court *Rule* 1:21-6, used the bank for the purpose of handling his unidentified client's fund in the performance of legal services and advice for his clients. The records of such an agent, which are integrally part of the work product of the attorney, are within the Attorney-Client privilege. The confidentiality of this relationship was upheld by the Superior Court of New Jersey in *Gannet v. First National State Bank of New Jersey, supra.*

In *United States v. Miller*, 96 S.Ct. 1619 (1976), this Court held the taxpayer had no Fourth Amendment interest in bank records, and that there was "no legitimate 'expectation of privacy' in their contents." The Court, however, carefully noted:

> "All documents obtained, including financial statements and deposit slips, contain only information *voluntarily* conveyed to the bank and exposed to their employees in the ordinary course of business." (Emphasis supplied.)

This is clearly different than the situation where the Petitioner has rendered substantial legal services to his client and where he is required to maintain a trust account into which all funds received on behalf of his clients must be deposited if the attorney is to remain a member of the bar in good standing of the State in which he practices. There is no *voluntary* conveyance to the Bank. There is also a reasonable expectation of privacy and confidentiality of such records under the New Jersey Supreme Court *Rule* 1:21-6(f) where it states, in relation to the trust account records:

> "When so produced (before the Ethics Committee or at the direction of the Supreme Court of New Jersey,) all such records shall remain *confidential* except for the purposes of the particular proceeding and their contents shall not be disclosed by *anyone* in such a way as to violate the Attorney-Client privilege." (Emphasis supplied.)

The Court below held that since this was a civil case involving nondiversity jurisdiction, the New Jersey Supreme Court *Rule* 1:21-6 was inapplicable. It determined that Federal law provided no basis for finding that an Attorney-Client privilege existed in this case. While it is incontroverted that the question of the privilege is governed by Federal law (*United States v. Osborn*, 409 F. Supp. 406 (D. Ore. 1975) and Federal Rules of Evidence 501), in *Baird v. Koerner, supra,* the Court stated:

> "And because the attorney is created by State law, and differs from State to State, so the nature and extent of the privilege that exists between the Attorney-Client varies, we find in Corpus Juris Secundum, 35 C.J.S. Fed. Court Section 131(b) the general rule stated, 'On the question of privileged communications the Federal Courts follow the law of the State of the forum'."

Therefore, the extent and nature of the privilege is determined by reference to State law. The New Jersey Supreme Court Rule which requires an attorney to maintain a trust account, sets forth rules regarding disclosure of the information contained in such accounts (1:21-6(f)), and states that the information shall not be disclosed by anyone so as to violate the Attorney-Client privilege. This rule must be considered in the determination of the extent of the privilege. As previously mentioned, the Superior Court of New Jersey, in *Gannet v. First National State Bank of New Jersey, supra,* which interpreted the Supreme Court *Rule* 1:21-6(f), held that this rule prevented the Bank from disclosing information contained in the attorney's trust account to the Internal Revenue Service.

3. In *United States v. Tratner, supra,* the Court of Appeals in considering an attorney's refusal to exhibit the payee's name on a check drawn on his escrow account remanded the case to the District Court for findings as to

> "(1) whether it (the check and information concerning the account) was integrally related to the giving of legal advice; (2) whether it was a business dealing or merely an attempt at concealment so unrelated to the giving of legal services as not to be protected by the Attorney-Client privilege, and (3) whether it was, in any event, a sham transaction."

By remanding the case to the lower Court, the Seventh Circuit not only reaffirmed its opinion in *Tillotson v. Boughner, supra,* but found that information in an attorney's trust account which is integrally related to the giving of legal advice is protected by the Attorney-Client privilege.

In accordance with the foregoing, Petitioner respectfully submits that the District Court in the instant case should not have initially ruled that the information contained in the trust account was not protected by the Attor-

ney-Client privilege without first holding an *in camera* hearing in order to determine whether the information contained therein was integrally related to the performance of legal services by Petitioner for his unidentified client. As a result of the failure to hold such a hearing, this Court should reverse and remand the instant case to the District Court for findings with respect to whether the information contained in Petitioner's trust account was, as Petitioner contends, integrally related to the giving of legal advice. (In accordance with *United States v. Tratner, supra.*)

The Government's knowledge of the information sought in the summons involved herein emanated from the Government's previous circumvention, invasion and violation of the Attorney-Client privilege by way of a summons served on the Bank and the Bank's unilateral partial compliance therewith prior to notifying the Petitioner. If this Court holds that the specific information in the attorney's trust account, which is integrally related to the giving of legal advice and services, is protected by the Attorney-Client privilege, the rule of admissibility of derivative evidence, the fruit of the poisonous tree doctrine, as enunciated in *Nardone v. United States*, 308 U.S. 338 (1939) is equally applicable in the instant case to prohibit the disclosure of the information which is sought in the summons involved herein.

It should also be recalled that prior to the date that the District Court turned over to the Government the documents requested in the summons involved herein, Petitioner applied for and received a Temporary Restraining Order enjoining the Bank from complying with the summons. As discussed previously, the Superior Court of New Jersey ruled that the information contained in an attorney's trust account is included within the Attorney-Client privilege. For the aforementioned reasons, Petitioner contends

that the decision of the Court of Appeals should be reversed.

4. Section 1829b of the Bank Secrecy Act of 1970 was intended to be an aid in tax investigations. However, Petitioner submits that it was never intended to infringe upon the Attorney-Client privilege or to be used to obtain bank records of an attorney's trust account which was required to be maintained by the rules of the highest court of the State where such attorney practices.

There has been no case which allowed the Government to obtain bank records of an attorney's trust account. The cases which have allowed the Government to obtain bank records have involved records of the taxpayer or a third party which were voluntarily given to the bank, (*United States v. Miller, supra,*) or where there was a mere debtor-creditor relationship (*Schulze v. Rayunec, supra*). The present case differs significantly in that the records maintained at the Bank were required by the Supreme Court *Rule* 1:21-6, and there was an expectation of privacy and confidentiality from such records since they were part of the attorney's records and part of the services he performed on behalf of a client (*United States v. Miller, supra*).

It is well settled that under unusual circumstances, a client's identity may be withheld by an attorney. It is contended that such circumstances are present in the instant case, that the information sought is an integral part of the attorney's advice to a client, and as such is within the Attorney-Client privilege. The Bank Secrecy Act of 1970 was not intended to curtail an existing Attorney-Client privilege.

5. Petitioner further contends that the issuance of the summons under Section 7602 of the Internal Revenue Code

was improper and an abuse of the District Court's process. In *United States v. Powell*, 379 U.S. 48 (1964) this Court, when referring to an abuse of the process of the Court, states:

> "Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute or for any other purpose reflecting on the good faith of the particular investigation."

This decision was amplified in *Reisman v. Caplin*, 375 U.S. 440 (1963) and *Donaldson v. United States, supra,* where the Supreme Court defined the good faith requirement to exclude the purpose of obtaining evidence in a criminal prosecution.

In *United States v. La Salle National Bank*, unofficially reported at 76-1 USTC par. 9407 (N.D. Ill. 1976), the enforcement of two Internal Revenue Service's summons issued upon La Salle National Bank were denied. At a hearing, evidence was introduced which established that at the time the summons was issued, a special agent was assigned to investigate the possible tax liabilities of an individual taxpayer (Gattuso) and that his investigation had not been concluded. The special agent testified that he had not yet determined whether to recommend criminal prosecution in this particular case. The evidence revealed that the special agent was the only agent assigned to this investigation and that no Revenue agent was working in conjunction with him. The Court stated:

> "The recommendation for criminal prosecution is certainly the event which definitely determines the focus of the Internal Revenue Service upon criminal prosecution as the end and goal of its investigation. It is apparent, however, that this focus and determination may be arrived at, under certain circumstances, before the actual recommendation for criminal prosecution has been made. In the event such focus and determination has been arrived at at the time of the issuance of the Internal Revenue summons, the fact that it precedes the formal recommendation for criminal prosecution is not relevant. An Internal Revenue summons under such circumstances is not issued in good faith.
>
> "The Supreme Court in the *Donaldson* case, supra, leaves no doubt that it regards as inappropriate the issuance of an Internal Revenue summons in an '. . . investigation solely for criminal purposes.' *Donaldson v. United States*, 400 U.S. 517, at 553.
>
> "It is apparent from the evidence that special agent, John F. Olivero, in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct of Mr. Gattuso."

The sole purpose of the summons issued in the instant case is to supply the necessary link (the identity of the taxpayer) in the chain of a criminal investigation of such taxpayer. Support for the foregoing can be readily seen from the testimony of the special agent at the hearing in the District Court on February 23, 1976. Page 86 of the transcript (App. 39a-40a) of that hearing indicates that the agent stated that the *sole* purpose of his investigation was to determine the violations of any criminal sections of the Internal Revenue Code. Furthermore, on pages 82 and 87 (App. 39a, App. 40a-App. 41a) the agent also testified that the purpose of his investigation was to determine the identity of the taxpayer, and the District Court so found.

In an effort to ascertain whether the nature of the special agent's investigation was criminal, Petitioner re-

quested all writings assigning the case to the special agent, all interoffice memorandum or interoffice directions concerning how this case was to proceed and function of the special agent. This request was denied (App. 42a).

It is the Petitioner's contention and the record supports the position that the summons involved herein was issued in aid of a criminal investigation, and, therefore, was not issued in good faith. This Court has recognized in *United States v. McCarthy*, 514 F.2d 368 (3rd Cir. 1975) that the summons must be issued in aid of a civil investigation in order to support the good faith requirement of *Donaldson v. United States, supra*, and *Reisman v. Caplin, supra*. Since this civil purpose is lacking and the sole purpose is a criminal investigation, the issuance of the summons is an abuse of the District Court's process as a step in a criminal investigation.

6. The issues presented by this case are of great and recurring significance in the administration of the Internal Revenue Laws, the collection of its revenue, and the ability of an attorney to render to a client legal services and advice without fear that his communications will be subject to Governmental subpoena.

The important nature of these issues is evidenced by the fact that if the Government prevails, it will preclude all taxpayers who have underpaid their taxes in the past and wish to correct such errors from doing so for fear of discovery, prosecution, and the assertion of civil or criminal fraud penalties, all stemming from disclosure of identity through confidential communications to an attorney. Additionally, such a determination would taint all Attorney-Client relationships due to the client's justified fear that a communication given to an attorney may be subject to disclosure. This would prevent full and free access to an

attorney, and deprive clients of full and complete legal advice.

The issues of the extent to which the Bank Secrecy Act of 1970 will be allowed to encroach upon the Attorney-Client privilege, if allowed at all, and the confidentiality of an attorney's trust account required to be maintained by the rules of the highest court of the State where the attorney practices are serious questions of public policy.

The effect of the decision below, if unreversed, upon the workings of the Internal Revenue Service, the confidentiality of dealings between an attorney and his client, and the limitations of the Bank Secrecy Act of 1970 make this case particularly appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

/s/ Herbert M. Gannet
HERBERT M. GANNET
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 75-2362

HERBERT M. GANNET,
Appellant,

v.

FIRST NATIONAL STATE BANK OF NEW JERSEY

(D.C. Civil No. 75-2028)

No. 76-1234

UNITED STATES OF AMERICA and
CARL E. REICHELT, Special Agent
of Internal Revenue Service

v.

FIRST NATIONAL STATE BANK
HERBERT M. GANNET, Intervenor in D.C.,
Appellant.

(D.C. Civil No. 76-124)

Appeal From the United States District Court for the
District of New Jersey

Argued October 5, 1976
Before Biggs, Van Dusen an Rosenn, *Circuit Judges*

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OPINION OF THE COURT
(Filed December 27, 1976)

VAN DUSEN, *Circuit Judge.*

This is an appeal by intervenor Herbert M. Gannet from a district court enforcement order [1] directing the First National State Bank of New Jersey to comply with an Internal Revenue Service summons requesting the identity of the purchaser of two cashier's checks, and the sources of

1. This order of February 23, 1976, in Civil 76-124 (D. N.J.) appears at 27a. The notice of appeal challenging the order was filed February 26, 1976, appears at 30a and was docketed at our No. 76-1234 on February 27, 1976.

the funds used to purchase those checks.[2] The question presented here is whether the attorney-client privilege protects this information from disclosure, since the cashier's checks were deposited in an attorney's trust account to facilitate anonymous transmission to the IRS in payment of a tax deficiency of an unknown taxpayer. We hold that it does not.

Since the facts of this case have been set forth in detail in *United States v. First National State Bank of New Jersey, Herbert M. Gannet, Intervenor-Appellant*, — F.2d —, No. 76-1261 (3rd Cir., July 28, 1976),[3] we need not restate them here, and proceed directly to consideration of the issues raised on this appeal.

I.

The instant case is similar to that of *Schulze v. Rayunec*, 350 F.2d 666 (7th Cir. 1965). There, Boughner, a tax attorney, was retained to represent a taxpayer who wished to remain anonymous, and delivered a cashier's check for $215,499.95 to the Internal Revenue Service without disclosing the taxpayer's identity. As in this case, when the IRS received the check, a special agent attempted to summon from the issuing bank information calculated to reveal the purchaser's identity. Upon the bank's refusal to comply, the IRS petitioned the district court for enforcement

2. This summons dated November 19, 1975, appears at 7a. After issuance of this summons, Gannet commenced Civil Action 75-2028 seeking to enjoin the bank from complying with this summons. When this application for injunctive relief was denied on December 1, 1975 (11a), Gannet appealed at our No. 75-2362. On April 8, 1976, this court entered an order granting a consent motion for leave to consolidate the appeals at Nos. 75-2362 and 76-1234 as a single proceeding.

3. See also *Gannet v. First National State Bank of New Jersey*, 410 F. Supp. 585 (D. N.J. 1976), constituting the district court opinion in support of its ruling which was reversed at our No. 76-1261 by the July 28, 1976, opinion. (See note 7 of the July 1976 opinion.) It is noted that all parties agree that these appeals are not moot. See *United States v. Friedman*, 532 F.2d 928, 931 (3d Cir. 1976). There is every indication that the Government will continue to seek bank records in this case.

of the summons, and the attorney intervened. Boughner sought to invoke the attorney-client privilege, claiming that the bank had acted as his agent, and that he had forwarded the check in the course of offering confidential legal services to a client.

The Seventh Circuit was not persuaded that the privilege applied, and noted that "Boughner personally did not acquire any rights concerning the bank's books and records," 350 F.2d at 668, by purchasing a cashier's check on behalf of an anonymous client. The court added that the bank

> ". . . was not hired or employed to render any confidential service. The communication, if any, of the client's name was not made in order to enable the bank to aid Boughner in giving any legal advice. In fact, it was not absolutely necessary to disclose the client's name. Boughner could have purchased the cashier's check by currency, although a currency transaction involving $215,000 would, undoubtedly, have been quite unusual."

350 F.2d at 668.

The court held that bank records pertaining to the cashier's check which the intervenor transmitted to the IRS were not "clothed with the attorney-client privilege." *Id.*[4]

This result is supported by subsequent developments in the law. The Bank Secrecy Act of 1970 (Act), 12 U.S.C. § 1829b,[5] requires that all federally insured banks main-

4. This court has stated in at least two opinions that absent unusual circumstances the identity of the client does not come within the attorney-client privilege. See *In re Semel*, 411 F.2d 195, 197 (3d Cir. 1969); *Mauch v. Commissioner of Internal Revenue*, 113 F.2d 555, 556-57 (3d Cir. 1940).

5. P.L. 91-508, 84 Stat. 1114, includes this language in §101 (see 12 U.S.C. §1829b):

"Retention of records by insured banks

". . . (a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

"(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

"(b) Where the Secretary of the Treasury (referred to in this section as the 'Secretary') determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purpose of this section.

"(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

"(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require–

"(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

"(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c).

"(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

"(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

"(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, but a longer period is necessary in the case of a particular type of record or evidence.

tain records of bank account transactions. The rationale, as § 1829(a)(2) expressly recognizes, is the usefulness of

such records in "criminal, tax, or regulatory investigations or proceedings."

The Supreme Court, implicitly following *Shulze v. Rayunec, supra,* held the record-breaking requirements of this Act constitutional in *California Bankers Assn. v. Schultz,* 416 U.S. 21 (1974), noting that

> "[b]anks are . . . not . . . neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance. . . ."

416 U.S. at 48-49.

Last term, the Supreme Court upheld the constitutionality of the disclosure of information recorded by banks under the Act in *United States v. Miller,* 44 U.S.L.W. 4528 (April 21, 1976). Miller urged that he had a Fourth Amendment interest in the records kept by banks, as copies of personal records made available to the banks for a limited purpose. However, the Supreme Court, after considering the standards enunciated in *Katz v. United States,* 389 U.S. 347, 353 (1967), and *Couch v. United States,* 409 U.S. 322, 335 (1973), found no legitimate expectation of privacy in the contents of records maintained by the banks under the mandate of the Act, using this language at 4530 of 44 U.S.L.W.:

> ". . . checks are not confidential communications, but negotiable instruments to be used in commercial transactions. All of the documents obtained including financial statements and deposit slips, contain only information voluntarily conveyed to banks and exposed to their employees in the ordinary course of business. The lack

"(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to record-keeping or reporting requirements conferred by other provisions of law."

> of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they 'have a high degree of usefulness in criminal, tax, regulatory investigations and proceedings.' . . .
>
> "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government."

II.

The intervenor, Gannet, would distinguish this case on the basis that state law[6] suggests that records in any way

6. Gannet relies upon New Jersey Supreme Court Rule 1:21-6 which includes the following language:

"Recordkeeping; Sharing of Fees; Examination of Records

"(a) Required Bank Accounts. All attorneys who practice in this State shall maintain in a financial institution in New Jersey, in their own name, or in the name of a partnership of attorneys, or in the name of the attorney or partnership of attorneys by whom they are employed:

"(1) a trustee account or accounts, separate from their business and personal accounts and from any accounts which they may maintain in the capacity of executor, guardian, trustee or receiver, into which trustee account or accounts all funds entrusted to their care shall be deposited; and

"(2) a business account into which all funds received for professional services shall be deposited.

"The names of the institutions in which such accounts are maintained and identification numbers of each account shall be recorded on the reporting form filed with the annual payment, pursuant to R. 1:28-2, to the Clients' Security Fund of the Bar of New Jersey. Such information shall be available for use in accordance with paragraph (f) of this rule.

"(b) Required Bookkeeping Records. All attorneys and partnerships of attorneys who practice in this State shall maintain for 7 years after the events which they record:

"(1) the records of all deposits in and withdrawals from the accounts specified in pargraph (a) of this rule and of any other bank account which concerns or affects their practice of law; and

"(2) a ledger book or similar record for all trustee accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds were held, the amount of such funds, the charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed; and

. . .

derived from an attorney's trust account are protected by the attorney-client privilege. The support for this view is a state requirement that attorneys maintain trust accounts in which to hold separate clients' funds.

However, as Gannet has stated correctly in his brief in *United States v. First National State Bank of New Jersey, Herbert M. Gannet, Intervenor-Appellant* (No. 76-1261), *supra* at 8, which he incorporated in his brief filed in these appeals and "made a part hereof by reference" (page 7):

"It is uncontroverted that since the adoption of the Federal Rules of Evidence on July 1, 1975, the resolution of the foregoing question [Does the attorney-client privilege extend, under the facts presented, to the identity of the client?] is governed by Federal common law and not State law. See Rule 501 and U.S. v. Osborn, 75-2 USTC ¶ 9865 (D. Ore. 1975)." [7]

"(4) copies of all statements to clients showing the disbursement of funds to them or on their behalf; and

"(5) copies of all bills rendered to clients; and

"(6) copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed.

"All attorneys who practice in this State shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their trustee accounts, in their ledger books and similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

"(f) Availability of Records. Any of the Records required to be kept by this rule shall be produced in response to a subpoena duces tecum issued pursuant to R. 1:20-6 in connection with a complaint or investigation pending before an ethics committee appointed pursuant to R. 1:20 or shall be produced at the direction of the Supreme Court before any person designated by it. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege."

See *Gannet v. First National State Bank of New Jersey, supra* note 3, at 588-89.

7. Federal Rule of Evidence 501 provides:

"Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil action and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

The Conference Committee Notes to Federal Rule of Evidence 501 (House Report No. 93-1597 on P.L. 53-595) state:

"In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. As Justice Jackson has said:

"A federal court sitting in a nondiversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state.

"D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 471 (1942) (Jackson J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus state law does not supply the rule of decision (even though the federal court may apply a rule derived from state decisions), and state privilege law would not apply."

Since this action is a "nondiversity jurisdiction civil case," we conclude that the New Jersey Supreme Court Rule 1:21-6 is inapplicable. In our estimation, federal law provides no basis for a finding that the attorney-client privilege applies here.

We find further support for our view in the Bank Secrecy Act of 1970, which indicates a strong congressional interest in making records of bank transactions available for use in criminal, tax, and regulatory investigations and proceedings. No mention is made in that statute of any exceptions to either compilation or dissemination of the information recorded and maintained. As noted above, the Supreme Court, in *California Bankers Ass'n* and *Miller* held the Act constitutional, finding that information voluntarily disclosed carries no legitimate expectation of privacy. In the instant case, there is no suggestion that the information sought to be protected was disclosed other than voluntarily.

We hold that the attorney-client privilege is not applicable to bank records merely because they derive from transactions involving an attorney's trust account. To hold otherwise would be to deny effect to the congressional purpose in enacting this legislation by allowing attorneys the discretion to insulate certain transactions from investigation by employing their trust accounts. Such a course would contradict both case law and statute.

III.

We have considered the other issue [8] raised by the intervenor-defendant, whether the Internal Revenue Service

8. We recognize that intervenor-defendant has adopted the portion of his brief in *United States v. First National State Bank of New Jersey, Herbert M. Gannet, Intervenor-Appellant*, No. 76-1261 (3d Cir.; see Opinion of July 28, 1976) directed toward the question of whether an attorney might be compelled to divulge the identity of his client, or whether a client's identity is protected by attorney-client privilege. Intervenor-defendant Gannet thereby raises again here precisely the same issue which was before this court in the above-mentioned case. At that time, a panel of this court found that the Government was without the statutory authority in the bank summons enforcement proceeding to ask Gannet the four questions related to discovering his client's contempt for refusing to answer [those] questions. In disposing of this appeal on the threshold issue of statutory power, we [did] not reach and hence [expressed] no opinion concerning Gannet's claim of attorney-client privilege." Since this court removed the threat of Gannet's being compelled to answer questions relating to his client's identity, this issue was resolved, in appellant's favor, and does not concern us here.

summons was issued in bad faith and constitutes an abuse of the district court's process, and find it without merit.[9]

IV.

Having determined that bank records kept in accordance with the Bank Secrecy Act of 1970 are not clothed with the attorney-client privilege merely because they derive from an attorney's trust account maintained at the bank, we will affirm (a) the December 1, 1975, district court order (D. N.J. Civil 75-2028) denying injunctive relief (see note 2 above), and (b) the February 23, 1976, district court order (D. N.J. Civil 76-124; see note 1 above).

A True Copy:

Teste:

for the Third Circuit,
Clerk of the United States
Court of Appeals

9. The burden of showing an improper purpose in issuing an Internal Revenue Service summons is on the taxpayer, *Donaldson v. United States*, 400 U.S. 517 (1971). And, as stated in *United States v. Fisher*, 500 F.2d 683, 687 (3d Cir. 1974), *aff'd*, 44 U.S.L.W. 4515 (Apr. 21, 1976):

> "It is now well settled that the possibility that criminal prosecution as well as civil liabilities may arise from a tax investigation is not a sufficient ground for refusing to enforce a summons issued under Section 7062 in good faith and prior to a recommendation for prosecution."

Here, as in *Fisher*, 500 F.2d at 688, it appears that the intervenor-defendant would have us hold that the burden of showing improper purpose is met merely by showing that a Special Agent of the Service's Intelligence Division was the person assigned to the case. The record reveals that Special Agent Reichelt was assigned to determine the identity of the anonymous taxpayer alone. Appendix at 134a, 140a. There is no basis whatsoever for a finding of abuse of process. See also *United States v. Friedman*, 532 F.2d 928, 932 (3d Cir. 1976); *United States v. Lafko*, 520 F.2d 622, 624-25 (3d Cir. 1975); *United States v. McCarthy*, 514 F.2d 368, 373-76 (3d Cir. 1975).

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 76-1261

UNITED STATES OF AMERICA and
CARL E. REICHELT,
Special Agent of Internal Revenue Service,

Petitioners-Appellees,

vs.

FIRST NATIONAL STATE BANK OF NEW JERSEY,

Respondent,

vs.

HERBERT M. GANNET,

Intervenor-Appellant.

(D.C. Civil No. 76-124)

On Appeal from Order of the United States District Court for the District of New Jersey

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Argued March 25, 1976

Before: SEITZ, *Chief Judge*, ROSENN and GARTH, *Circuit Judges*

OPINION OF THE COURT
(Filed July 28, 1976)

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GARTH, *Circuit Judge*

This case presents us with the question of whether an intervening party in an administrative summons enforcement proceeding may be held in civil contempt for refusing to answer questions which range beyond the scope of the proceeding. We hold that the Internal Revenue Service (IRS), the administrative agency involved, lacked the statutory power to require answers to questions which were unrelated to the enforcement of the summons and that therefore the district court erred in imposing a civil contempt sanction.

I.

In November, 1974, the Internal Revenue Service Center in Holtsville, New York received a cashier's check issued by the National Newark & Essex Bank from Herbert L. Zuckerman, an attorney. As the accompanying letter explained, Zuckerman forwarded this check in the amount of $142,497.81 to the Internal Revenue Service on behalf of a taxpayer whose name was unknown to him but who owed taxes and interest for prior years. Zuckerman wrote that the taxpayer was paying these moneys on the recommendation of counsel.

Upon receipt of this check and letter the IRS commenced an investigation to determine the identity of the unnamed taxpayer. *See United States v. Bisceglia,* 420 U.S. 141 (1975). The first stage of the inquiry resulted in information that the source of the funds for the cashier's check was a check drawn on the Herbert M. Gannet Trust Account at First National State Bank of N.J. (Bank) payable to Zuckerman in the amount of $142,497.81. Thereafter, on October 3, 1975, pursuant to 26 U S.C. § 7602,[1] the IRS served a summons on the Bank seeking information concerning the Herbert M. Gannet Trust Account. This summons sought all negotiable instruments and deposit slips relating to the source of funds used for the issuance of the $142,497.81 check as well as monthly bank statements for this trust account.

1. 26 U.S.C §7602 provides:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Apparently, appellant Gannet, an attorney, had been consulted by the unnamed taxpayer about a potential tax liability for past years. Legal advice had evidently been imparted to the taxpayer-client, and based upon that advice, a decision was made to pay the tax deficiencies plus interest in a manner which was designed to protect the taxpayer's identity. We can further assume that Zuckerman, who wrote to IRS and forwarded the cashier's check, was engaged to assist in this endeavor of shielding the taxpayer's identity from disclosure.

In response to the summons the Bank furnished the IRS with two cashiers' checks that had been deposited in the Gannet Trust Account. These checks had been purchased at the Bank's Port Newark branch office on October 31, 1974 in the amounts of $65,182.66 and $77,315.15 (totalling $142,497.81).

The Bank then informed Gannet that it had furnished the above information to the IRS in compliance with the summons. Gannet served written notice on the Bank directing it not to provide any further information concerning his Trust Account.

As the IRS investigation continued a second IRS summons was served on the Bank on November 19, 1975. This summons required the Bank to:

> Furnish information as set forth below which pertains to the purchase of cashier's checks numbered 39649 and 39651 in the respective amounts of $65,182.66 and $77,-315.15 dated October 31, 1974 which were purchased at the Port Newark Office:

1. Name, address and social security number of the purchaser of the above-described cashier's checks.

2. All documentation relative to the source of funds used to purchase the above-described checks.

After the Bank notified Gannet of this second attempt to obtain information, Gannet commenced Civil Action No. 75-2028 in which he sought to enjoin the Bank from complying with the November 19, 1975 summons. This application for injunctive relief was denied by the district court.[2]

The government then filed a complaint in the U.S. District Court for the District of New Jersey to enforce the summons which had issued on November 19, 1975, This latter complaint, based upon 26 U.S.C. §§7402(b),[3] 7604(a),[4] alleged that the IRS was engaged in an investigation to determine the federal tax liabilities of an unknown taxpayer and that the Bank "is in possession and control of papers and documents concerning the above-described investigation." The IRS asserted that the information sought in the summons was not within its possession and that

2. However, this Court, on Gannet's application, enjoined the Bank from complying with the November 19, 1975 summons pending appeal in Civil Action No. 75-2028 or government enforcement of the summons.

3. 26 U.S.C. §7402(b) provides:

(b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

4. 26 U.S.C. §7604(a) provides:

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

> [i]t was and is now essential to the determination of the correct tax liability of John Doe, for the years 1968 through 1974, inclusive, that the defendant be required to appear and to produce the documents, records and other information sought in the summons and to give testimony regarding those documents and records. . . .

On January 22, 1976 the district court ordered that the Bank show cause why it should not be compelled to obey the IRS summons. This order to show cause stated:

> All motions and issues raised by the pleadings will be considered on the return date of this order. Only those issues raised in motion or brought into controversy by the responsive pleadings and supported by Affidavit(s) will be considered at the return of this order. . . .

Thereafter Gannet moved to intervene in the enforcement proceeding as a defendant in order to oppose enforcemnt of the IRS summons against the Bank. His proposed Answer to the government's complaint alleged that "the documents, records and other information sought in the summons are protected from being produced by the attorney-client privilege."

On February 23, 1976, the parties appeared before the district court for the enforcement hearing. The district court first granted Gannet's motion for intervention and then ordered the enforcement proceeding consolidated with Gannet's earlier suit for injunctive relief (Civil Action No. 75-2028). Next the court had the parties address Gannet's claim of attorney-client privilege set forth in his Answer. Gannet argued that the records of his Trust Account at the Bank, the subject of the first IRS summons of October 3, 1975, were shielded from disclosure with

respect to the unnamed taxpayer. He also contended that since the November 19, 1975 summons before the court was based upon privileged information that had been improperly taken from the records of his Trust Account, the district court should deny enforcement of this latter summons. In response, the government argued that the materials sought by the summons were bank records which were not privileged from disclosure.

Following the arguments of counsel the government called Gannet to testify at the enforcement hearing. Gannet was asked the following questions:

> "Mr. Gannet, will you please tell the court whether or not—or if you purchased cashier's checks number 39649 and 39651 in the respective amounts of $65,-182.66 and $77,315.15 on October 31st, 1974 from National State Bank."

> "Mr. Gannet, what was used to purchase the two cashier's checks in question, and I may amplify my question—. . . Currency, Treasury bills, Certificate of Deposit, whatever?"

> "Mr. Gannet, can you tell whether you know what medium of exchange was used to purchase these checks?"

> "Mr. Gannet, I must ask you, since yo uhave intervened in this case you obviously did not intervene in this case you obviously did not intervene on your own behalf, but you intervened on behalf of some other party, and for that reason I ask you who you represent, who is the real party in interest on whose behalf you have intervened?"

Gannet objected to these questions on two grounds: (1) that the line of questioning was "entirely irrelevant

to the proceedings on the summons now in question" and (2) that the questions sought to evoke answers protected by the attorney-client privilege. The district court overruled both objections and ordered Gannet to answer. Gannet refused.

Immediately thereafter, on February 23, 1976, the district court granted enforcement of the summons against the Bank. Gannet appealed from this order at No. 76-1234.

On February 27, 1976 the district court summarily ordered Gannet confined pursuant to 28 U.S.C. §1826(a)[5] until such time as he answered the government's questions. This confinement order was stayed pending an application to this Court for a stay of the enforcement order of February 23, 1976. Gannet also filed a notice of appeal from the confinement order at No. 76-1261, which is the appeal with which we are here concerned.

On March 8, 1976 this Court denied Gannet's motion for a stay pending appeal of the district court's February 23, 1976 order which enforced compliance with the IRS summons. Subsequently, the Bank's records required by the summons were delivered to IRS.[6] On March 11, 1976, this Court granted Gannet's motion for a stay pending appeal of the confinement order of February 27, 1976.

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5. 18 U.S.C. §1826(a) states:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

6. The appeal from the district court's February 23, 1976 enforcement order is still pending before this Court at No. 76-1234 even though the Bank has furnished the materials sought.

Thus Gannet has not yet commenced serving the civil contempt sentence which had been imposed on February 27, 1976. It is only the appeal from the order of confinement that is now before us.[6a]

The parties initially joined issue on the question of whether Gannet, asserting an attorney-client privilege, properly refused to answer the four questions which the government asked during the enforcement proceeding. In its opinion the district court focused exclusively upon that issue.[7] However, Gannet had also objected to the questions asserting their irrelevancy to the proceedings then under way. In an addendum to his brief in this Court, Gannet argued that the questions posed were not relevant to the enforcement of the IRS summons. In reply the government urged that a witness has no right to object to questions on the ground of relevancy, but that in any case the particular questions here were relevant to the enforcement proceeding.[7a]

Gannet's objection to relevancy brought into issue the power and authority of the IRS in this enforcement proceeding to question him on matters unrelated to the enforcement of the Bank summons. Since this objection raised a threshold question as to the power of the IRS, it must necessarily be resolved before we can reach any subordinate issue including that of an asserted attorney-client privilege. We therefore turn to a consideration of the authority under which the IRS can compel discovery and whether that authority was exceeded in this case.

6a. As indicated, when the district court entered its order on February 27, 1976, it directed that Gannet be confined until such time as he responded to the question that had been asked of him. The implementation of that order was stayed pending an application by Gannet to this Court. We have serious doubts as to whether the district court could have imposed any effective civil contempt sanctions under 28 U.S.C. §1826 as the order recites, or even under its inherent power, *see* Shillitani v. United States, 384 U.S. 364, 370 (1966), after enforcement of the summons had been granted.

However, because of the nature of the particular proceeding, the continuing effect of the February 27th order and both the district court's and our stay of that order which forestalled any incarceration, we do not pursue this issue, noting that it has never been raised, briefed, nor presented to us by the parties.

7. 410 F. Supp. 585 (D. N.J. 1976).

7a. In making its argument the government relied upon Nelson v. United States, 201 U.S. 92 (1906); People's Bank v. Brown, 112 Fed. 652 (3d Cir. 1902); Marcus v. United States, 310 F.2d 143, 147 n. 2 (3d Cir. 1962), *cert. denied*, 372 U.S. 944 (1963). We reject that argument for the reasons discussed in text, *infra*.

III.

Congress has provided the Internal Revenue Service with elaborate investigative powers to determine the tax liability of any taxpayer. Under §7602 of the Internal Revenue Code of 1954, 26 U.S.C. §7602, the IRS is authorized

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax. . . . [t]o summon . . . any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate . . . to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry.

Where there has been noncompliance with a summons seeking testimony or the production of evidence, the IRS may seek judicial enforcement. The Internal Revenue Code provides that a federal district court "shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data." *See* notes 3, 4, *supra*.

The judicial proceeding provided for the enforcement of an IRS summons is no mere rubber stamp approval. *See In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3d Cir. 1973) (*Schofield I*). An enforcement action is "an adversary proceeding affording a judicial determination of

the challenges to the summons and giving complete protection to the witness." *Reisman v. Caplin*, 375 U.S. 440, 446 (1964); *Donaldson v. United States*, 400 U.S. 517 (1971). At such a judicial hearing, *United States v. McCarthy*, 514 F.2d 368, 372 (3d Cir. 1975) requires that the IRS must be prepared to make a preliminary showing in support of its summons—

> (1) That the investigation has a legitimate purpose and that the inquiry may be relevant to that purpose, (2) that the information sought is not already within the government's possession and (3) that the steps required by the Internal Revenue Code have been followed. . . .

The burden then shifts to the party named in the summons to establish any defenses or to prove that enforcement would constitute "an abuse of the court's process."[8] *United States v. Powell*, 379 U.S. 48, 58 (1964). Thus the entire enforcement proceeding from its inception through hearing is strictly limited to the narrow issue of whether the summons is to be enforced.

Here the IRS summons to the Bank sought information concerning the cashier's checks purchased at its Port Newark branch office. In support of the summons enforcement complaint, which was directed only against the Bank and not Gannet, Special Agent Reichelt submitted an affidavit which satisfied the *McCarthy* requirements (*see* p. 11, *supra*), averring among other facts that the contents of the Bank records in question were not in the possession of IRS and that they were "essential to the investigation." Thus, IRS carried its initial burden with respect to enforcement of the summons against the Bank. *United States v. McCarthy, supra.*

8. Enforcement will be denied, for example, where it is established that the material is sought for use in a criminal prosecution or where the information is held to be protected by the attorney-client privilege. Reisman v. Caplin, 375 U.S. at 449.

In response the Bank and Gannet asserted various defenses, all of which opposed judicial enforcement of the IRS summons to the Bank. Thus the only issue before the district court was whether or not the November 19, 1975 Bank summons seeking certain Bank records was to be enforced.

However, during the enforcement hearing the government called Gannet as a witness and commenced a line of questioning that neither supported enforcement of the summons nor rebutted any defenses raised against enforcement. While these questions were undoubtedly relevant to the overall IRS investigation of the unknown taxpayer, they were completely irrelevant to the single issue before the court—whether the November 19, 1975 summons to the Bank should be judicially enforced. In effect, the government, by this means, sought to convert a narrow and limited enforcement proceeding into a general investigative proceeding. We know of no authority which grants the IRS an unlimited commission to interrogate witnesses under oath on matters unrelated to enforcement of the summons then before the court.

As previously discussed, Congress has empowered IRS to carry on its investigative functions through the issuance of administrative summonses. Judicial involvement only arises where there has been noncompliance with a summons. The judicial enforcement proceeding that follows is strictly limited to granting or denying enforcement of the terms of the specific summons. To permit inquiry into areas unrelated to the enforcement of the summons, as was the situation with respect to the questions asked of Gannet here, violates this Congressionally mandated procedure.

As we have observed, no summons has ever been issued to Gannet. Consequently, Gannet has not had the opportunity to comply with or to contest a summons seeking

information of his own knowledge and of his own actions. Furthermore, the government has not been obliged to satisfy the *McCarthy* requirements in a summons enforcement proceeding as they may relate to information sought to be elicited from Gannet. Finally, and most importantly here, only after a summons had issued to Gannet and had been judicially enforced against him would Gannet's refusal to comply or testify subject him to the possibility of civil contempt. In our view, the government exceeded its statutory powers under §§7602, 7402(a), and 7604(a) by utilizing the summons enforcement proceeding with respect to the Bank as an investigative tool to pry information from Gannet.

IV.

Having concluded that the government was without statutory authority in the Bank summons enforcement proceeding to ask Gannet the four questions at issue here (*see* p.6, *supra*), we must reverse the district court's order which adjudged Gannet in contempt for refusing to answer these questions. In disposing of this appeal on the threshold issue of statutory power, we do not reach and hence express no opinion concerning Gannet's claim of attorney-client privilege.

We will reverse and remand to the district court with the direction that the contempt and confinement order of February 27, 1976 be vacated, a which time our stay pending appeal will terminate.

TO THE CLERK:

Please file the foregoing opinion.

/s/
Circuit Judge

SEITZ, *Chief Judge*, dissenting.

It is important to keep in mind that the confinement order presently before us arose during statutory proceedings initiated by the I.R.S. to secure judicial enforcement of a summons directed solely to the Bank. At the court hearing, the intervenor-appellant, as a witness, refused to answer certain questions and his refusal resulted in a contempt order which finally eventuated in the confinement order now on appeal.

Given the setting in which they were asked, I must presume that the questions posed to the intervenor-appellant sought to elicit evidence which would aid the court in determining whether to enforce the summons against the Bank. However, despite the intervenor-appellant's refusal to answer, the court proceeded to enter a final order directing the Bank to comply with the summons. Since the relief sought against the Bank, i.e., enforcement of the summons, has been obtained, the underlying contempt order is, in my view, no longer viable.

The purpose of civil contempt is wholly remedial. It is designed to coerce compliance with the lawful orders of the court, rather than vindicate the court's authority. *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904 (3d Cir. 1975), *cert. denied* 423 U.S. 863 (1975). However, once enforcement of the summons had been obtained, the testimony of the intervenor-appellant became unnecessary. Consequently, the contempt order and its implementing confinement order can now serve no proper remedial purpose. I would therefore dismiss this appeal as moot.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, entered February 27, 1976, be, and the same is hereby reversed and the cause is remanded to the district court with the direction that the contempt and confinement order of February 27, 1976 be vacated, at which time our stay pending appeal will terminate. Costs are taxed against the appellees.

ATTEST:

/s/ Thomas
THOMAS
Clerk

July 28, 1976

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
NOS. 75-2028 AND 76-124

Approved for Publication

UNITED STATES DISTRICT COURT
For the District of New Jersey

Civil 75-2028

HERBERT M. GANNET,
Plaintiff,

vs.

FIRST NATIONAL STATE BANK OF N.J.,
Defendant.

Civil 76-124

UNITED STATES OF AMERICA and
CARL E. REICHELT, Special Agent
of the International Revenue Service,
Plaintiff,

vs.

FIRST NATIONAL STATE BANK OF N.J.,
Defendant,

vs.

HERBERT M. GANNET,
Intervenor.

Appearances:

HARVEY R. POE, ESQ. (Newark, N.J.) for Gannet

SHANLEY & FISHER, ESQS. (Newark, N.J.) by John J. Francis, Jr., Esq. and Charles M. Costenbader, Esq., for First National State Bank of N.J.

JONATHAN L. GOLDSTEIN, ESQ., U.S. Attorney (Newark, N.J.) by Z. Lance Samay, Esq. William Robertson, Esq., and Andrew M. Higgins, Esq., Assistant U.S. Attorneys and by Gerald C. Miller, Esq., (Washington, D.C.), Tax Division, Dept. of Justice, for United States of America and Reichelt.

OPINION
(Filed March 1976)

BIUNNO, J.

In this case, some of the facts are not in dispute; others are assumed for the purpose of this determination.

The undisputed facts are as follow. In the due course of the mails, the Internal Revenue Service Center (IRS) at Holtsville, N.Y., received a certified letter from Herbert L. Zuckerman, Esq., a Newark attorney, dated November 4, 1974. The letter enclosed a cashier's check, number 488562, issued by National Newark & Essex Bank, payable to IRS, for $142,497.81.

The letter said that the check represented additional amounts due from "a taxpayer for past years;" that Mr. Zuckerman did not know the taxpayer's name, and that the aggregate additional amount, "together with interest computed to November 5, 1974" totalled the amount of the check.

It further said that Zuckerman was informed that taxpayer was not aware of any investigation in process by IRS, and that taxpayer's attorney had concluded that additional taxes were due and recommended that payment be made. Finally, it asked that the check be deposited in the Deposit Fund Account of the Treasury of the United Statts, or in such other account as appropriate "for unidentified collections."

An IRS official, informed of the letter and checks, instructed a special agent to try to find out who the taxpayer was. The first stage of inquiry produced information that the source of the funds for the cashier's check was a check, No. 1186, drawn by Herbert M. Gannet Trust Account at First National State Bank of N.J. (FNSB) to Zuckerman, dated November 4, 1974, in the amount of $142,497.81.

On October 3, 1975, IRS issued an administrative summons (26 U.S.C. §7602) to FNSB asking for all negotiable instruments and deposit tickets relating to the source of the funds used for the Gannet/Zuckerman check, as well as monthly bank statements and deposit tickets for $1,000 or more for the period October 1 through November 4, 1974, in the Gannet account.

This inquiry produced the information that two cashier's checks were deposited in the Gannet account, these having been purchased at FNSB's Port Newark branch office on October 31, 1974, in the amounts of $65,182.66 and $77,315.15 (total, $142,497.81).

On November 19, 1975, IRS issued another administrative summons to FNSB, returnable December 2, 1975, asking for the name, address and social security number of the purchaser of the cashier's checks, and for all documentation relative to the source of the funds used to purchase the checks.

Meanwhile, and about October 31, 1975, FNSB informed Gannet of the first summons and that it had furnished the two cashier's checks to IRS. On about November 3, 1975, Gannet served a written demand on FNSB that it not furnish any further information on his trust account to IRS, and that it advise IRS that it would refuse to furnish such further information.

When the second summons was served on November 19, 1975, FNSB informed Gannet of it, although it was not directed to Gannet's trust account, and Gannet filed in this court the first of the two pending actions, Civil No. 75-2038. With the filing of the complaint, Gannet sought an order to show cause why FNSB should not be enjoined from obeying the summons, along with a temporary restraint.

This application was heard November 26, 1975 on informal notice to FNSB and, at the court's direction, to IRS, which appeared *amicus curiae*.

The assumed facts are that some individual, partnership or corporation consulted Gannet about a potential tax liability for past years. Presumably, calculations were made of deficiencies and of interest thereon for the years involved. Presumably legal advice was given in respect to taxpayer's obligations, in respect to civil and criminal statutes of limitations, and in respect to available options for dealing with the matter. Presumably, the taxpayer chose to make a voluntary payment of deficiencies and interest in a way calculated to avoid disclosing his identity. Presumably, it was conceived to be desirable for Gannet to engage Zuckerman to write the letter to IRS and to obtain and forward the cashier's check.

These assumed facts are fairly evident from what was done by the taxpayer, by Gannet and by Zuckerman in

dealings with third parties. The taxpayer, or someone acting for him, dealt with someone at the Port Newark Office of FNSB to purchase two cashier's checks on October 31, 1974. The checks were deposited in Gannet's trust account, and he drew a check to Zuckerman for their total. That check was used by Zuckerman to buy a cashier's check in the same amount, and this check he sent to IRS with his letter of November 4, 1974, making the disclosures noted above.

The argument for Gannet in the first case was grounded on the attorney-client privilege, F.Ev.Rule 501, and on N.J. Court Rule R.1:21-6, requiring all attorneys to establish and maintain trust accounts for clients' funds, separate and apart from other bank accounts.

The order to show cause and interim restraint were denied, first on the ground that disclosure of the identity of the client does not come within the scope of the privilege, and second that the administrative summons was directed to third-party records, i.e., FNSB records, and did not call on the attorney to make any disclosure.

An appeal was taken, but while it was pending the second suit was filed, this by IRS against FNSB, to compel compliance with the summons. An order to show cause why the summons should not be ordered enforced was issued, returnable February 23, 1976, with a schedule for filing answers and briefs, and for an opportunity to Gannet to apply for intervention.

At the hearing, Gannet was allowed to intervene in the second case, and both cases were ordered consolidated for all purposes. This places before the court all parties in interest except the taxpayer, whose interests are represented by Gannet, and permits dealing effectively with the merits.

During the hearing, Gannet was called to the stand by the United States. After stating that he was a member of the bar of New Jersey and of this court, he was asked, in substance, the following questions, with the results indicated:

Q. 1: Did you purchase the two cashier's checks at the Port Newark Office of FNSB? (not answered)

Q. 2: What was used to buy the two cashier's checks, currency, treasury bills certificate of deposit or whatever? (not answered)

Q. 3: Do you know what medium of exchange was used to purchase these checks? (Not answered)

Q. 4: Are you the taxpayer for whom the check was sent to IRS? A: No

Q. 5: Who is the real party in interest for whom you acted? (Not answered)

In respect to each question not answered, an objection was made and overruled. The witness' attention was directed to 28 U.S.C. §1826 and its provision that whenever a witness refuses, without just cause, to comply with an order to testify, the court may summarily order his confinement in a suitable place until such time as the witness is willing to testify as ordered. Gannet was so ordered, and on his refusal to testify (grounded on the attorney-client privilege) he was summarily ordered to be confined.

Basically, three questions of law are presented:

(1) May Gannet be required to disclose the identity of his client, or is that information within the scope of the attorney-client privilege?

(2) Is information embodied in bank records brought within the scope of the attorney-client privilege by reason of the provisions of N.J. Court Rule, R.1:1-21-6?

(3) Is the information sought by the present summons, i.e., bank records and bank testimony about the purchase of the two cashier's checks and the source of the funds used, within the scope of the attorney-client privilege?

Disposition of the first question is governed by F.Ev. Rule 501, which provides, in pertinent part, that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." There is one exception, namely when otherwise required by the U.S. Constitution, or by Act of Congress or in rules prescribed by the Supreme Court under statutory authority. That exception does not apply here. The second exception is that in civil matters, where State law supplies the rule of decision on an element of a claim or defense, then the privilege is determined by State law. That exception does not apply here since this matter solely relates to federal taxes.

In the original version approved by the Supreme Court on November 20, 1972, Rule 503 dealt explicitly with the attorney-client privilege. Neither the text of the rule nor the note of the Advisory Committee addressed the question here involved. The same is true of the Senate, House and Conference Committee Reports on P.L. 93-595, which was enacted as the Federal Rules of Evidence. (Senate Report No. 93-1277; House Report No. 93-650; Conference Report No. 93-1597).

Two decisions in this circuit do deal with the specific question. *In re Semel,* 411 F.2d 195, at 197 (CA 3, 1969); *Mauch v. C.I.R.*, 113 F.2d 555 at 556-7 (CA 3, 1940).

The same result has been reached in New Jersey, a common law state. *State v. Toscano*, 18 N.J. 418, at 424-5 (1953); *In re Richardson*, 31 N.J. 391 at 396-401 (1960). These decisions, from this internal discussion, analysis and precedents cited, appear to reflect the overwhelming weight of authority. See also, Annotation, 16 A.L.R. 3d. 1047; 15 A.L.R. Fed. 771. The privilege does not embrace the client's identity.

The second question must be answered with the conclusion that R.1:21-6 does not affect the result. In the first place, the provisions of that Rule are the equivalent of a State statute, in execution of the authority placed in the Supreme Court of New Jersey by N.J. Const. 1947, Art. 6, §2 par. 3, dealing with "admission to the practice of law and the discipline of persons admitted" Since State law does not supply the rule of decision for any element of the claim or defense in this case, it cannot apply, F.Ev.Rule 501.

Beyond that, even if State law applied, the rule relied on does not say what Gannet claims. R.1:21-6(a) requires New Jersey attorneys to keep separate accounts in a financial institution in New Jersey (1) for the deposit of all funds entrusted to their care, called a "trustee account," and (2) a business account for the deposit of all funds received for professional services.

R.1:21-6(b) separately requires the keeping of *records* by attorneys, for a period of 7 years, showing deposits and withdrawals in the bank accounts; ledgers for all trustee accounts showing the sources of funds deposited, the persons for whom held, the amounts, the charges or withdrawals and to whom paid; copies of all retainer and compensation agreements; copies of statements to clients showing disbursements to or for them; copies of

bills to clients; and copies of records showing payments to other attorneys and others, not in their regular employ, for services rendered or performed.

R.1:21-6(f), on which Gannet relies, directs that "any of the *records* required to be kept" by the rule are to be produced on subpoena duces tecum in an ethics committee matter or before the Supreme Court; and "when so produced" all such *records* shall "remain confidential" and shall not be disclosed in a way that would violate the attorney-client privilege.

This provision does not apply to the bank account, but to the *records* called for by R.1:21-6(b). It does not create any privilege; it requires disclosure in ethics proceedings and says that despite such disclosure whatever was privileged is to remain privileged. In this respect it reflects the principle of N.J.Ev.Rule 37, namely that "a disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contact, shall not constitute a waiver under this section." See also, the last sentence of proposed F. Ev.Rule 511 (1972), not adopted.

The answer to the third question clearly is that no privilege is involved. *Schulze v. Rayunec*, 350 F.2d 666, at 668-9 (CA 7, 1965), the companion case to *Tillotson*, mentioned below, dealing with an IRS summons to produce bank records. These are obviously third-party disclosures which are not part of a "confidential communication between attorney and client." Also pertinent is *Harris v. U.S.*, 413 F.2d 316, at 320 (CA 9, 1960), holding that when an attorney acts as a transmitter of funds, he stands in the same position as a banker, and no confidential relationship arises; and also *SEC v. First Security, etc.*, 447 F.2d 166 at 167 (CA 10, 1971) and cases there cited.

When the unidentified taxpayer went to the Port Newark office of FNSB to arrange to buy the two cashier's checks which are the subject of the summons, the transaction and any conversation that took place could not have been a privileged communication between attorney and client.

IRS has a perfectly lawful objective in seeking out by investigation the identity of the undisclosed taxpayer. On the civil side alone, it is entitled to verify that the amount paid for taxes and interest is the correct amount; it may be entiled to claim civil penalties as well. And it is entitled to check these and other questions without delay to avoid the bar of the statute of limitations for any taxable year, which normally arises on April 15 of each year.

Gannet's major argument rests on two federal decisions: *Baird v. Koerner*, 279 F.2d 623, 95 ALR 2d 303 (CA 9, 1960); and *Tillotson v. Boughner*, 350 F.2d 663 (CA 7, 1965). Both cases involved a situation in which an attorney sent IRS a cashier's check on behalf of an unidentified client to pay a tax obligation. In both cases, an IRS summons was issued to the attorney calling on him to disclose the client's identity.

In *Baird*, the Court of Appeals conceived that the point was governed by California law, which it determined to embrace the identity of the client within the privilege. In *Tillotson*, the Court of Appeals noted that Illinois law was silent on the point, and relied on *Baird* as reflecting federal law (which it did not).

Baird cannot apply because of F.Ev.Rule 501. *Tillotson* was in error, overlooking the fact that *Baird* was grounded on California law. Neither case is controlling here, since the Court of Appeals for the Third Circuit has ruled the other way (and in accordance with the weight of authority) in both *Semel* and *Mauch*, supra.

The application for an order directing FNSB to respond to the summons is granted, and no stay pending appeal will be allowed except as may be ordered by the Court of Appeals. Gannet is ordered to be confined until he is ready to answer the questions he refused to answer; that confinement is stayed until the Court of Appeals grants or denies a stay on the order enforcing the summons. The motion to quash the summons is denied.

In the first of these consolidated cases, the court directed FNSB, as a condition of stay pending application to the Court of Appeals, that it deposit with the court in a sealed envelope, such documentation in response to the summons as it had gathered by 4 PM of Monday, December 1, 1975.

At the hearing of February 23, 1976, the court stated that it would continue to hold these sealed papers until the Court of Appeals had either granted or denied a stay pending appeal of the order to enforce the summons. That stay having been denied on March 8, 1976, the sealed papers will now be turned over to IRS.

Since these payers may or may not provide the name of the taxpayer, IRS may apply *ex parte* for a bench warrant for Gannet's arrest and confinement until he is ready to answer the questions listed above. On the return of the warrant and before confinement, he will be given another opportunity to answer.

The stay of the confinement which was granted was to last only until the Court of Appeals had acted on the motion for stay of the order enforcing the summons. Since that motion has been denied, the confinement order is now in full force and effect.

/s/ Vincent P. Biunno,
U.S.D.J.

Original to Clerk
xc: All counsel

SUPPLEMENT TO OPINION

Since filing the above opinion, the Court has learned that on March 11, 1976, by a divided vote, the Court of Appeals granted a stay of the Order of Summary Confinement pending disposition of the Appeal, and until the further Order of the Court. Consequently, application for a bench warrant will not be entertained at this time.

TRANSCRIPT OF FEBRUARY 23, 1976

(Transcript commencing at 82-4)

Q In the case where there is an investigation for fraud actually initiated, which is not this case you say, what is your function then?

A Would you repeat the question again?

Q In the case where there is an actual investigation underway, who makes the decision that there should be an investigation? Do you make that or some superior?

A A superior makes the determination.

Q What is his title?

A Usually the Group Manager.

Q Group Manager, and there has been no such direction in this case?

A In this instant case my Group Manager has requested me to obtain the identification of this taxpayer.

Q And that is all?

A That is all.

Q Assume you have the identification of the taxpayer and you were instructed to conduct an investigation. What would you do to conduct that? In a general way, what sort of things do you do?

A We have to check the taxpayer's filing records, see if there were returns on file for the particular tax-

° ° °

(Transcript commencing at 86-1)

Q When do you request it?

A If there is an on-going investigation.

Q What does the revenue agent do in the normal case?

A He is responsible for the computation of the taxes.

Q You are not responsible for the computation of taxes?

A No, I am not.

Q In fact, your purpose is to determine the violation of any criminal section of the Internal Revenue Code?

A That is correct.

Q That is your sole purpose, correct?

A That is correct.

MR. POE: Your Honor, that I believe satisfies the requirement I mentioned before, good faith.

THE COURT: You are not talking about the good faith of the witness, but the good faith of the IRS, and the IRS has a letter and a check, and it has assigned the determination of who that check relates to to a special agent of the Intelligence Division. Once he learns who that is, as he testified, if there is any calculation or computation needed he will call in a revenue agent. He can't do that because there is nothing for the revenue agent to look at at this time. I don't see that proves the lack of good (Tr. p. 87) faith at all. It falls short of it and I so find.

MR. POE: I believe you put the burden on us to prove something that the Third Circuit has said is the Government's burden to prove.

MR. FRANCIS: May I ask some questions if Mr. Poe has finished?

CROSS-EXAMINATION BY MR. FRANCIS:

Q Is it your testimony that your only purpose in this matter is to determine the identity of the taxpayer?

A That is correct at this point.

Q And these were the only instructions given you by your Group Manager?

A That is correct.

Q What is the name of your Group Manager?

A Charles C. Rapa.

Q Did he give you those instructions in writing?

A No.

Q When did he give you those instructions?

A November of '74.

Q Is there any memorandum or any writing at all which defines your role or responsibility, your function in this case?

THE COURT: In this case?

MR. FRANCIS: In this case.

° ° °

(Transcript commencing at 94-1)

THE COURT: You are not the taxpayer.

MR. GANNET: We would like to have a copy of the subpoena originally issued to the National Newark & Essex Bank. We would like to have a copy of all writings assigning the inquiry to the agent who preceded Mr. Reichelt as well as the record of all written assignments of this case to Mr. Reichelt. We would like to have a copy of any inter-office memorandum or inter-office directions in terms of how this case was to proceed and what the function of each special agent assigned to the Intelligence Division was in this particular case, and we would like to have a copy of

any reports, recommendations or other writings advising the supervisor or Group Manager as to the findings of Mr. Reichelt as well as the findings of the Intelligence Agent of the Special Intelligence Division that preceded Mr. Reichelt in this case, and I do make the request of this Court to order this witness to produce these records.

MR. FRANCIS: I join in that request.

THE COURT: That request is denied. Insofar as this is an inquiry, the so-called two pronged test of Donaldson, it seems to be quite obvious that the Government has absolutely nothing it could inquire into at this point except the identity of the taxpayer. There is nothing else to do. Now the question which it is suggested the Court has to decide is whether the summons was issued for the sole

* * *

INTERNAL REVENUE CODE OF 1954 SECTIONS 7602 AND 7604

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—.

(1)To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) JURISDICTION OF DISTRICT COURT.—If any person is summoned under the internal revenue laws to appear, to

testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) ENFORCEMENT.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

BANK SECRECY ACT OF 1970
12 U.S.C. SECTION 1829b

§1829b. Retention of records by insured banks—Congressional findings and declaration of purpose.

(a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particlar value in this respect.

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

Rules and regulations

(b) Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

Identity of persons having accounts and persons authorized to act with respect to such accounts; exemptions

(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require

of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

Reproduction of checks, drafts, and other instruments; record of transactions; identity of party

(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

Identity of persons making transactions reportable under the Currency and Foreign Transactions Reporting Act

(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

Additions to or substitutes for required records

(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

Retention period

(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

Report to Congress by Secretary of the Treasury

(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority with respect to recordkeeping or reporting requirments conferred by other provisions of law.

RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY RULE 1:21-6

1:21-6. Recordkeeping; Sharing of Fees; Examination of Records

(a) Required Bank Accounts. All attorneys who practice in this State shall maintain in a financial institution in New Jersey, in their own name, or in the name of a partnership of attorneys, or in the name of the attorney or partnership of attorneys by whom they are employed:

(1) a trustee account or accounts, separate from their business and personal accounts and from any accounts which they may maintain in the capacity of executor, guardian, trustee or receiver into which trustee account or accounts all funds entrusted to their care shall be deposited; and

(2) a business account into which all funds received for professional services shall be deposited.

The names of the institutions in which such accounts are maintained and identification numbers of each account shall be recorded on the reporting form filed with the annual payment, pursuant to R. 1:28-2, to the Clients' Security Fund of the Bar of New Jersey. Such information shall be available for use in accordance with paragraph (f) of this rule.

(b) Required Bookkeeping Records. All attorneys and partnerships of attorneys who practice in this State shall maintain for 7 years after the events which they record:

(1) the records of all deposits in and withdrawals from the accounts specified in paragraph (a) of this rule and of any other bank account which concerns or affects their practice of law; and

(2) a ledger book or similar record for all trustee accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds were held, the amount of such funds, the charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed; and

(3) copies of all retainer and compensation agreements with clients; and

(4) copies of all statements to clients showing the disbursement of funds to them or on their behalf; and

(5) copies of all bills rendered to clients; and

(6) copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed.

All attorneys who practice in this State shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their trustee accounts, in their ledger books and similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(c) Partnership Dissolutions. Upon the dissolution of any partnership of attorneys the former partners shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in paragraph (b) of this rule.

(d) Members, Associates and Employees of Out-of-State Firms. All attorneys who practice in this State who are members of a firm, or associates or employees of a firm or attorney, practicing outside the State.

(1) shall not share with such firm or attorneys any fee for legal services rendered in this State if payment to such firm or attorney is prohibited by DR 2-107 of the Disciplinary Rules of the Code of Professional Responsibility; and

(2) shall maintain and preserve for 7 years separate records of the fees received and expenses incurred in their practice of law in this State.

(e) Attorneys Associated with Out-of-State Attorneys. All attorneys who practiced in this Sate shall maintain and preserve for 7 years a record of all fees received and expenses incurred in connection with any matter in which they were associated with an attorney of another state.

(f) Availability of Records. Any of the records required to be kept by this rule shall be produced in response to a subpoena duces tecum issued pursuant to R. 1:20-6 in connection with a complaint or investigation pending before an ethics committee appointed pursuant to R. 1:20 or shall be produced at the direction of the Supreme Court before any person designated by it. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

(g) Disciplinary Action. Any attorney who does not maintain and keep or cause to be maintained and kept the accounts and records as specified and required by this rule, or who does not produce any such records pursuant to paragraph (f) of this rule, shall be subject to disciplinary proceedings.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

(Filed March 15, 1976)

Upon the Verified Complaint and the Affidavit of Herbert M. Gannet, Esq. annexed hereto, it is on this 15th day of March, 1976

ORDERED that the Defendant, First National State Bank of New Jersey show cause before this Court on the 26th day of March, 1976, at nine o'clock a.m. or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein enjoining the Defendant, First National State Bank of New Jersey, its officers, directors, agents, servants, employees and attorneys and all persons in active concert and participation with them, from delivering to the Internal Revenue Service any and all information requested in the Internal Revenue Service Summons dated November 19, 1975, a copy of which is annexed hereto as Exhibit A, and from testifying with respect to any and all of the documents requested therein; and

It appearing to the Court that the Summons requests information and documentation that emanates from Plaintiff's Trust Account which he is required to maintain at a financial institution in the State of New Jersey under R. 1.21-6 of the Rules Governing the Courts of New Jersey; and

It appearing according to the allegations of Plaintiff's Complaint that if Defendant were to comply with the Internal Revenue Service Summons, such compliance would violate R. 1.21-6(f) because such compliance would violate the attorney-client privilege which protects the information in such Trust Account; and

It appearing that unless Defendant is restrained by Order of this Court from complying with the Internal Revenue

Service Summons, that immediate and irreparable injury, loss or damage will result to Plaintiff insofar as the attorney-client privilege has been claimed; and it is further

ORDERED that the Defendant, First National State Bank of New Jersey, its officers, directors, agents, servants, employees and attorneys and all persons in active concert and participation with them be and they hereby are restrained from complying with the Internal Revenue Service Summons pending the return day of this Order to Show Cause; and it is further

ORDERED that this Order expire on March 26, 1976 unless the order for good cause shown is extended, or unless the Defendant consents that it may be extended for a longer period; and it is further

ORDERED that service of this Order to Show Cause, together with a copy of the papers hereto annexed be served on Defendant on or before the 16th day of March, 1976, at ten o'clock a.m., be deemed sufficient service.

/s/ Irwin I. Kimmelman
IRWIN I. KIMMELMAN
J.S.C.

Defendant may move to modify or discharge this temporary restraint on 2 days notice. This order is entered solely for the purpose of preserving the status quo between the parties pending a hearing.

TRANSCRIPT T-396-75
(Filed March 29, 1976)

Transcript commencing at p. (2).

COURT: About ten days ago I entered an order restraining the First National State Bank from divulging certain information concerning certain aspects of Mr. Gannet's lawyer's trust account.

Unbeknownst to me at that time, although known to Mr. Gannet and not represented to me, the bank had already given that information to Federal Judge Biunno in confidence.

I should have been notified to that effect but I wasn't. It then appears that Judge Biunno, acting upon ex parte application of the U.S. Attorneys Office and in the face of an appeal concerning the validity of his order directing disclosure, nevertheless, went ahead and turned over the material to the U.S. Attorneys Office.

MR. GANNET: That is right.

COURT: I am not here as a judge of one jurisdiction to start questing or criticizing a ruling of a judge of another jurisdiction but it certainly seems to me that rather than an ex parte turnover there should have been notice and perhaps my original order in this case may not have been a restraining order against the bank had I known that (Tr. p. 3) the bank had already turned the records over by Court order to Judge Biunno.

I just don't know.

MR. GANNET: May I address myself to that?

COURT: Nor do I know what reasons motivated Judge Biunno for doing what he did. All right. He did what he did and he, obviously, was cognizant of my order but he felt that he had no grounds to adhere to it because it

didn't bind him and he already had the records at the time I entered the injunction.

So what more is there? The case is moot.

MR. GANNET: If your Honor please, the records that were originally turned over to Judge Biunno were turned over to him under seal with my understanding and I think Mr. Francis' understanding that they would be returned to the bank in the event the enforcement order was upheld on appeal or in the event a stay was not granted by a three-judge panel.

There was never any indication nor any understanding that the records would not be turned back to the bank.

(4) Tr. p. COURT: Mr. Gannet, the bank didn't do anything wrong since the date of my order; not a thing. They just stayed where they were. They had the injunction and they obeyed the injunction but it was beyond their power at this point and I have nothing further to do. I can't proceed.

MR. GANNET: Well, there are two other points I'd like this Court to consider. Number one, the bank may have additional information or testimony available by its officers who would be questioned or subpoenaed by the Internal Revenue Service.

Number two, the Internal Revenue Service who was present in your Court at the time that the temporary restraining order was granted pending this appeal—two attorneys for the government were sitting in your Chambers and notwithstanding your order the following day they stated to the newspapers that they would ignore your order and they made demand upon Judge Biunno for the turning over of those records.

COURT: And, the newspapers put in that the Internal Revenue representative said we intend to ignore (Tr. p. 5) Judge Kimmelman's order.

MR. GANNET: That is their decision.

COURT: I don't have jurisdiction over them.

MR. GANNET: I appreciate that, your Honor. You do have jurisdiction over the First National State Bank. I am still proceeding with the appeal in the third circuit notwithstanding the fact that Judge Biunno turned over the records in spite of the fact that the appeal is pending. I would like to have this Court continue the stay; continue the restraint against the bank and at least until the third circuit issues its result.

I'd also like to have this Court make a definitive statement or judgment on what our rules of court mean in terms of Rule 121-6 as to whether or not my attorney's trust account is part of the privileged communications as disclosed in that Rule.

COURT: Mr. Gannet, I wouldn't have given you the original temporary restraining order if I didn't think the Rules of Court meant what they say.

MR. GANNET: Judge Biunno found otherwise, your Honor, and this is one of the problems I will have (Tr. p. 6) in presenting this case in the third circuit.

COURT: That is why we have upper courts. No one says that we are infallible.

MR. GANNET: I would ask the Court to continue this stay, your Honor, for those reasons.

COURT: What about that, Mr. Francis, that the bank officers now should be restrained from testifying as to these transactions?

MR. FRANCIS: If your Honor please, it seems to me that this Court's decision or ruling on trust records might be very interesting but purely an academic exercise. The documents have been produced by the United States District Court. There isn't a rise left for this Court to operate on.

Any order this Court entered would, in effect, be a nullity.

COURT: I am afraid so, Mr. Gannet, the matter is now moot. It has been mooted by circumstances over which we have no control and your redress, if any, lies in another forum. I am very sorrder.

The order to show cause is discharged.

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CERTIFICATION

I, MARYANN SMYTHE do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceedings.

/s/ Maryann Smythe
MARYANN SMYTHE, C.S.R.
An Official Court Reporter

DATED: March 28, 1976

No. 76-1262

In the Supreme Court of the United States

OCTOBER TERM, 1976

HERBERT M. GANNET, PETITIONER

v.

FIRST NATIONAL STATE BANK OF NEW JERSEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner Herbert M. Gannet is an attorney practicing in New Jersey. In November 1974, the Internal Revenue Service received a letter from Herbert Zuckerman, an attorney, transmitting a cashier's check in the amount of $142,497.81. Zuckerman's letter explained that the check represented additional amounts due from a taxpayer for past years and that the name of the taxpayer had not been disclosed to Zuckerman (R. 41a).[1] In July 1975, the Internal Revenue Service served a summons on Zuckerman's bank in order to determine the source of the funds Zuckerman paid to the Internal Revenue Service. In response to the summons, the bank turned over a copy of a

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[1]"R." and "Supp. R." respectively refer to the record appendix and the supplemental record appendix in the court of appeals.

$142,497.81 check, drawn on the trust account of petitioner, and payable to Zuckerman. This check was drawn on the First National State Bank (Supp. R. 2). On October 3, 1975, the Service served a summons on the First National State Bank seeking copies of all negotiable instruments and deposit slips relating to the source of the $142,497.81 payment from Gannet to Zuckerman. In response to the summons, the bank furnished the Service with copies of cashier's checks numbered 39649 and 39651 (totalling $142,497.81), which had been issued by the bank and then deposited in Gannet's trust account (Pet. App. 14a-15a).

The bank informed Gannet of its compliance with the summons. Gannet then gave the bank written notice not to provide the Internal Revenue Service with any further information concerning his trust account (Pet. App. 15a). On November 19, 1975, the Service issued a second summons to the bank seeking the identity of the purchaser of cashier's checks numbered 39649 and 39651 and all documentation relating to the source of the funds used to purchase the cashier's checks (Pet. App. 15a-16a). Gannet brought an action to enjoin the bank from complying with the summons. After the bank did not comply, the government brought this action to enforce the summons. The two cases were consolidated in the United States District Court for the District of New Jersey (Pet. App. 31a). The district court ordered the summons enforced (Pet App. 37a), and the court of appeals and Mr. Justice Brennan denied petitioner's requests for a stay pending appeal (Pet. 6). The district court thereafter turned over to the

government the documents sought by the summons.[2] The court of appeals affirmed (Pet. App. 1a-11a).[3]

1. The courts below correctly held that the attorney-client privilege did not bar the enforcement of the Internal Revenue Service summons against the First National State Bank of New Jersey. That privilege applies only to confidential communications between attorney and client and does not encompass communications by a third party unless he is acting merely as an agent in transmitting the communication from the client to the attorney. *Fisher* v. *United States*, 425 U.S. 391, 403-405; VIII Wigmore, *Evidence* §2317, p. 619 (McNaughton rev. 1961); *Bouschor* v. *United States*, 316 F. 2d 451, 456-458 (C.A. 8), and cases cited therein; *United States* v. *Goldfarb*, 328 F. 2d 280 (C.A. 6), certiorari denied, 377 U.S. 976; *United States* v. *Threlkeld*, 241 F. Supp. 324 (W.D. Tenn.). Since the purpose of the privilege is to encourage clients to make full disclosure to their attorneys, it protects only those disclosures necessary to obtain legal advice. *Fisher* v. *United States*, *supra*, 425 U.S. at 403; *In re Horowitz*, 482 F. 2d 72, 81 (C.A. 2) (Friendly, J.).

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[2]The bank turned the records over to the district court prior to the time petitioner obtained from a local court an order temporarily restraining the bank from disclosing the information requested in the summons to the Internal Revenue Service. Pending its decision, the court kept the records under seal (see Pet. App. 51a-54a).

[3]Although the court of appeals noted that it had held in *United States* v. *Friedman*, 532 F. 2d 928, 931 (C.A. 3), that production of summoned records while an appeal was pending from an order directing enforcement of the summons did not render the case moot, two other circuits have dismissed as moot appeals in such cases. See, *e.g.*, *United States* v. *Lyons*, 442 F. 2d 1144 (C.A. 1); *Baldridge* v. *United States*, 406 F. 2d 526 (C.A. 5); *Grathwohl* v. *United States*, 401 F. 2d 166 (C.A. 5). Moreover, unlike this case, the decision in *Friedman* turned in part on the fact that there had been incomplete compliance with the order enforcing the summons (see 532 F. 2d at 931).

It is well established that, absent unusual circumstances, the attorney-client privilege does not protect disclosure of the identity of a client, the conditions of employment, the amount of a fee and who paid it. See, *e.g.*, *United States* v. *Cromer*, 483 F. 2d 99 (C.A. 9); *In re Semel*, 411 F. 2d 195, 197 (C.A. 3), certiorari denied, 396 U.S. 905; *Colton* v. *United States*, 306 F. 2d 633, 637 (C.A. 2), certiorari denied, 371 U.S. 951 (see Pet. App. 4a n. 4). But the correctness of the decision below need not rest on this settled proposition because the bank records in this case do not constitute confidential information between petitioner and his client. As the court of appeals observed (Pet. App. 3a-4a), this case is on all fours with *Schulze* v. *Rayunec*, 350 F. 2d 666 (C.A. 7). There, as here, an attorney delivered a cashier's check on behalf of a client to the Internal Revenue Service and sought to invoke the attorney-client privilege to bar the enforcement of a summons to the bank to disclose the identity of the purchaser. The court rejected the claim, stating that the bank "* * * was not hired or employed to render any confidential service * * * [and that] [t]he communication, if any, of the client's name was not made in order to enable the bank to aid * * *[the attorney] in giving any legal advice" (350 F. 2d at 668).[4] Accord: *O'Donnell* v. *Sullivan*, 364 F. 2d 43, 44 (C.A. 1), certiorari denied, 385 U.S. 969; *Harris* v. *United States*, 413 F. 2d 316, 319-320 (C.A. 9); *Securities and Exchange Commission* v. *First Security Bank of Utah*, 447 F. 2d 166, 167 (C.A. 10), certiorari denied, 404 U.S. 1038.

Nothing in *Baird* v. *Koerner*, 279 F. 2d 623 (C.A. 9); *Tillotson* v. *Boughner*, 350 F. 2d 663 (C.A. 7); or *In re Grand*

[4]While petitioner (Pet. 13) attempts to distinguish *Schulze* on the ground that the attorney in that case merely transmitted the funds and did not perform legal services, nothing in the opinion supports his assertion.

Jury Proceedings, 517 F. 2d 666 (C.A. 5), upon which petitioner relies (Pet. 8, 12), is to the contrary. Those cases involved attempts to require an attorney to disclose the identity of a client upon whose behalf the attorney had made payments. Here, however, the summons was directed to a third party bank and not to the attorney. There is no legitimate expectation of privacy in information voluntarily communicated to a bank. Thus, the bank records sought by the summons are not private papers subject to any claim of privilege, constitutional or otherwise. *United States* v. *Miller*, 425 U.S. 435, 440-441; *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 48-49. See also *Couch* v. *United States*, 409 U.S. 322, 335-336. Indeed, the Court has specifically upheld the use of an Internal Revenue summons to compel a bank to disclose a depositor's identity. *United States* v. *Bisceglia*, 420 U.S. 141.[5]

Petitioner further argues (Pet. 13-14) that he did not voluntarily convey the information to the bank because New Jersey Supreme Court Rule 1:21-6 (Pet. App. 48a-50a) requires an attorney to maintain a trustee account. While the Rule provides that all attorneys are to maintain trustee accounts into which all funds entrusted to their care shall be deposited, it did not require that petitioner deposit the two cashier's checks in question into his trustee's account. Cf. *Johnson* v. *United States*, 228 U.S. 457 (discussed in *Couch* v. *United States*, *supra*, 409 U.S. at 332 n. 14). Indeed, petitioner has failed to show any reason why these two cashier's checks, which totalled the exact amount

[5]In *United States* v. *Tratner*, 511 F. 2d 248 (C.A. 7), upon which petitioner relies (Pet. 8, 15-16), the court ordered a hearing to determine whether certain information in the hands of an attorney qualified under the attorney-client privilege. Here, however, the court of appeals correctly ruled that the attorney-client privilege does not apply to a bank's records of an attorney's trust account.

transmitted to the Service in payment of the tax liability of the undisclosed taxpayer, could not have been transmitted directly to the Internal Revenue Service rather than deposited in the trustee account. The circumstances strongly suggest that he deposited the checks in the account solely for the purpose of preventing the Service from discovering the identity of the taxpayer.[6]

2. Finally, petitioner argues (Pet. 17) that the Bank Secrecy Act of 1970 (84 Stat. 1114, 12 U.S.C. 1829b), upon which the court of appeals relied (Pet. App. 10a), was never intended to diminish the attorney-client privilege. But the Act requires that all federally insured banks maintain certain records specifically because such records are useful in "criminal, tax, and other regulatory investigations." There is no exception for trustee accounts of attorneys and there is nothing in the legislative history to support the existence of such an exception. The court of appeals therefore properly relied upon the Bank Secrecy Act as evidence of a strong congressional interest in making such records available to law enforcement authorities. For reasons previously stated,

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[6]Petitioner also argues that there is a legitimate expectation of confidentiality as to information conveyed to a bank in regard to an attorney's trustee account because New Jersey Supreme Court Rule 1:21-6(f) states that when any of the records required to be kept by the rule are produced in response to a direction of the Ethics Committee or the New Jersey Supreme Court, "all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege." But nothing in the rule suggests that it encompasses records maintained by a bank (see New Jersey Supreme Court Rule 1:21-6(b); Pet. App. 48a-49a).

At all events, the court of appeals correctly rejected petitioner's argument, renewed here (Pet. 14-15), that the question of privilege is controlled by state law (Pet. App. 7a-9a). See Rule 501, Federal Rules of Evidence, which provides that federal law determines the nature and extent of the privilege of a witness.

however, the attorney-client privilege is not thereby diminished since it is inapplicable to such records in any event.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

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[7]Petitioner also claims (Pet. 8, 17-20) that the summons was issued for an improper purpose and that enforcement was an abuse of the court's process. But the court of appeals correctly rejected this argument, stating that (Pet. App. 11a, n. 9) "[t]he record reveals that Special Agent Reichelt was assigned to determine the identity of the anonymous taxpayer alone. R. 134a, 140a. There is no basis whatsoever for a finding of "abuse of process."